STATE OF MICHIGAN

COURT OF APPEALS

ESTATE OF RAYETTA HERSCHFUS, by BRIAN HERSCHFUS, Personal Representative, Plaintiff-Appellant/Cross-Appellee, v MARC SAKWA, M.D., NICHOLAS A. TEPE, M.D., SOUTHEASTERN MICHIGAN CARDIOVASCULAR SURGEONS, and WILLIAM BEAUMONT HOSPITAL, Defendants-Appellees/Cross-Appellants.	UNPUBLISHED June 16, 2015 No. 322003 Oakland Circuit Court LC No. 2011-122088-NH

Before: JANSEN, P.J., and SAWYER and FORT HOOD, JJ.

PER CURIAM.

Plaintiff, the Estate of Rayetta Herschfus, by Brian Herschfus, personal representative[1], appeals as of right a judgment of no cause of action following a jury trial in this medical malpractice action. Defendants, Marc Sakwa, M.D., Nicholas Tepe, M.D., Southeastern Michigan Cardiovascular Surgeons, and William Beaumont Hospital, cross-appeal as of right the same order; they challenge an earlier order denying summary disposition on statute of limitations grounds. We affirm the judgment of no cause of action and therefore do not reach the issue raised on cross-appeal.

This medical malpractice case arises from the death of decedent during open heart surgery performed by Dr. Sakwa and Dr. Tepe at William Beaumont Hospital ("Beaumont") on March 31, 2009. Decedent was 79 years old at the time of her death. Plaintiff's theories of liability were that Dr. Sakwa and Dr. Tepe did not properly repair a rupture of a portion of decedent's heart called the AV groove, which arose as a complication at the end of her surgery,

[1] We will refer to Rayetta Herschfus as "decedent" and to Brian Herschfus, in his capacity as personal representative of decedent's estate, as "plaintiff." We note that, in addition to being decedent's son and the personal representative of decedent's estate, Brian Herschfus has also served as both lead trial attorney and appellate attorney for the estate in this case.

and that decedent's informed consent for the operation was not properly obtained. At the conclusion of a six-day jury trial, the jury found that Dr. Sakwa and Dr. Tepe were not professionally negligent. The trial court entered a judgment of no cause of action in favor of defendants.

Plaintiff first argues that the trial court abused its discretion in denying plaintiff's request to sequester defense witnesses. In particular, plaintiff contests the trial court's refusal to exclude defense expert Dr. Gary Goodman from the courtroom during the testimony of Dr. Rhonda Marvar, the anesthesiologist in decedent's surgery. We disagree with plaintiff's argument. A trial court's decision whether to sequester witnesses is reviewed for an abuse of discretion. *In re Jackson*, 199 Mich App 22, 29; 501 NW2d 182 (1993); *Werthman v Gen Motors Corp*, 187 Mich App 238, 244; 466 NW2d 305 (1990). An abuse of discretion occurs when the trial court's decision falls outside the range of reasonable and principled outcomes. *Maldonado v Ford Motor Co*, 476 Mich 372, 388; 719 NW2d 809 (2006). A party is not entitled to reversal of a judgment based on an erroneous sequestration decision unless prejudice is shown. *In re Jackson*, 199 Mich App at 29; *Kwaiser v Peters*, 6 Mich App 153, 159; 148 NW2d 547 (1967).

Initially, we note that plaintiff cites no authority to support his position on this issue. "An appellant may not merely announce his position and leave it to this Court to discover and rationalize the basis for his claims, nor may he give issues cursory treatment with little or no citation of supporting authority. An appellant's failure to properly address the merits of his assertion of error constitutes abandonment of the issue." *Houghton ex rel Johnson v Keller*, 256 Mich App 336, 339-340; 662 NW2d 854 (2003) (citations omitted). We will nonetheless address the issue.

MRE 615 states, in relevant part: "At the request of a party the court may order witnesses excluded so that they cannot hear the testimony of other witnesses, and it may make the order of its own motion." See also MCL 600.1420 ("The sittings of every court within this state shall be public except that a court may, for good cause shown, exclude from the courtroom other witnesses in the case when they are not testifying . . . .").

Plaintiff argues that the parties agreed on the first day of trial to sequester all witnesses except for decedent's family members. The record contains no support for this contention. There are no sequestration orders in the lower court file and no rulings requiring sequestration in the transcripts. Nor does the record contain evidence that the parties stipulated to sequester witnesses. Plaintiff appends to his appellate brief affidavits of himself, his brother, and an associate attorney to support his sequestration argument. These affidavits are dated December 10, 2014, which was the day before plaintiff filed his appellate brief. These affidavits may not be considered because they are not contained in the lower court file, "and a party may not expand the record on appeal." *Detroit Leasing Co v Detroit*, 269 Mich App 233, 237; 713 NW2d 269 (2005); see also *Sherman v Sea Ray Boats, Inc*, 251 Mich App 41, 56; 649 NW2d 783 (2002) ("This Court's review is limited to the record established by the trial court, and a party may not expand the record on appeal.").

Moreover, plaintiff fails to cite authority or present argument establishing that sequestration of an expert witness is required. "The facts or data in the particular case upon which an expert bases an opinion or inference shall be in evidence." MRE 703. Therefore, it is permissible to allow an expert to hear the testimony of a fact witness given that the expert's

opinion is required to be based on facts or data that are in evidence. Plaintiff cites no authority establishing that it is appropriate to deny an expert witness access to the facts in evidence. Plaintiff had an opportunity to cross-examine Dr. Goodman regarding the fact that he altered part of his opinion after hearing Dr. Marvar's testimony as a fact witness. We further note that Dr. Goodman's presence in the courtroom did not give rise to the type of risk that sequestration ordinarily is intended to prevent: a witness who "colors" his or her testimony to conform to another witness's testimony. See *People v Stanley*, 71 Mich App 56, 61; 246 NW2d 418 (1976). Because Dr. Goodman's opinion was required to be based on facts in evidence, MRE 703, and his presence did not give rise to the type of risk that sequestration ordinarily serves to prevent, *Stanley*, 71 Mich App at 61, the trial court's declination to exclude him from the courtroom during the testimony of a fact witness fell within the range of principled outcomes.

Plaintiff next argues that the trial court abused its discretion in permitting defense counsel to use an article written by plaintiff's expert witness to impeach that witness. We disagree. "A trial court's decision to admit or exclude evidence is reviewed for an abuse of discretion. An abuse of discretion occurs when the trial court chooses an outcome falling outside the range of principled outcomes." *Edry v Adelman*, 486 Mich 634, 639; 786 NW2d 567 (2010) (citation omitted). This same standard of review applies to a trial court's decision whether to permit the impeachment of an expert witness with a learned treatise. See *McCarty v Sisters of Mercy Health Corp*, 176 Mich App 593, 600; 440 NW2d 417 (1989). "A decision on a close evidentiary question ordinarily cannot be an abuse of discretion." *Lewis v LeGrow*, 258 Mich App 175, 200; 670 NW2d 675 (2003). Any preliminary questions of law are reviewed de novo. *Barnett v Hidalgo*, 478 Mich 151, 159; 732 NW2d 472 (2007). "We review a trial court's decision regarding discovery for an abuse of discretion." *VanVorous v Burmeister*, 262 Mich App 467, 476; 687 NW2d 132 (2004), overruled in part on other grounds by *Odom v Wayne Co*, 482 Mich 459 (2008).

Plaintiff again cites no pertinent authority to support his position and has therefore abandoned this issue. *Johnson*, 256 Mich App at 339-340. We will nonetheless address the issue.

Plaintiff argues that defense counsel's use of an article written by plaintiff's expert, Dr. Darryl Weiman, to impeach him on cross-examination contravened a May 29, 2012 order entered by the predecessor trial court judge. That order stated, in relevant part: "Defendants are required to provide to Plaintiff's counsel any and all documentation Defendants will or may rely on at trial no later than seventy two (72) hours prior to the commencement of the first deposition herein." Plaintiff asserts that he was not provided a copy of the article used to impeach Dr. Weiman and that, although defense counsel gave him a copy at trial when the trial court directed him to do so, defense counsel then took the document back moments later when the jury returned, because it was defense counsel's only copy. Plaintiff claims he was "compromised" by the trial court's decision to allow "this introduction of new material[.]" We do not find plaintiff's argument convincing.

MRE 707 provides:

> To the extent called to the attention of an expert witness upon cross-examination, statements contained in published treatises, periodicals, or pamphlets on a subject of history, medicine, or other science or art, established as

> a reliable authority by the testimony or admission of the witness or by other expert testimony or by judicial notice, are admissible for impeachment purposes only. If admitted, the statements may be read into evidence but may not be received as exhibits.

For the purpose of MRE 707, an "authority" is an "accepted source of expert information or advice." *McCarty*, 176 Mich App at 600 (quotation marks and citation omitted).

Plaintiff does not contend that the article authored by his own expert, Dr. Weiman, failed to qualify as a reliable authority. Instead, plaintiff argues that the use of this article was precluded by the predecessor trial court judge's May 29, 2012 order requiring defendants to give plaintiff "any and all documentation [d]efendants will or may rely on at trial no later than seventy two (72) hours prior to the commencement of the first deposition herein." The article in question was not admitted at trial but was merely used to impeach Dr. Weiman. It is not clear that the May 29, 2012 order required the disclosure of an article that was used only for impeachment, particularly where the article was written by plaintiff's own expert. Although plaintiff claims he lacked an opportunity to review the article, plaintiff fails to explain why he could not have obtained a copy of his own expert's publication. The final pretrial order that was entered on January 16, 2013, more than a year before trial, revealed that defendants intended to introduce as exhibits "[a]ny and all publications of Dr. []Weiman[.]" Accordingly, plaintiff's contention that he lacked an opportunity to review his own expert's publication is unavailing.

But even if the May 29, 2012 order is read to have required defendants to produce the article written by Dr. Weiman, and even if defendants failed to comply with the order, plaintiff fails to address why the remedy for such a violation must be to bar the use of that article to impeach Dr. Weiman. The order does not prescribe a particular remedy for a violation of the order.[2] Even assuming that the order did require that a violation of the order precluded the use of a document for impeachment purposes at trial, plaintiff fails to explain why or whether the trial court was bound by that order. A trial court has unrestricted discretion to review its previous decisions; the law of the case doctrine does not apply to a trial court's decisions; and a successor judge may correct errors made by a prior judge. *Prentis Family Foundation, Inc v Karmanos Cancer Institute*, 266 Mich App 39, 52-53; 698 NW2d 900 (2005).

Further, even if plaintiff could establish that the trial court erred in permitting the use of the article to impeach Dr. Weiman, plaintiff fails to support with argument the bare assertion that plaintiff was "compromise[d]" by the use of the article at trial. "A trial court error in admitting or excluding evidence will not merit reversal unless a substantial right of a party is affected, MRE 103(a), and it affirmatively appears that failure to grant relief is inconsistent with substantial justice, MCR 2.613(A)." *Lewis*, 258 Mich App at 200 (citations omitted). Plaintiff may not leave it to this Court to discover and rationalize the basis for his bare assertion of

[2] Another portion of the order states that defendants' failure to provide full and complete discovery responses and to attach documents will subject defendants to sanctions, but the order does not specify the nature of the sanctions.

prejudicial error; his failure to properly address the merits of his claim constitutes abandonment of the issue. *Johnson*, 256 Mich App at 339-340.

Plaintiff next argues that the trial court abused its discretion in admitting the testimony and records of decedent's treating cardiologist, Dr. Alan Silverman. We disagree. Plaintiff has again failed to cite any pertinent authority to support his position and has therefore abandoned this issue. *Johnson*, 256 Mich App at 339-340. We will nonetheless address the issue.

Plaintiff presents a rambling argument that is difficult to follow. Plaintiff suggests that Dr. Silverman testified as a standard of care expert concerning the informed consent issue. Plaintiff contends that a witness who testifies as an expert in one field may not testify concerning the standard of care for another specialty. We find no indication that Dr. Silverman testified as an expert concerning the informed consent issue. Rather, Dr. Silverman testified as a fact witness concerning decedent's medical history and treatment, as well as the facts surrounding her March 9, 2009 heart catheterization and the meetings that Dr. Silverman and Dr. Sakwa attended with decedent and her family after the catheterization in which the findings from the catheterization and the proposed surgery were discussed. We find no basis to conclude that Dr. Silverman testified as an expert witness concerning the informed consent issue.

Plaintiff contends that the jurors told him after trial that they relied on "notations" in Dr. Silverman's records and that no such notations were included in the copy of Dr. Silverman's records provided to plaintiff. Further, plaintiff says that the defense exhibit was returned to defendant after trial, making it impossible for plaintiff to ascertain what was in the exhibit and to compare it to the copy of Dr. Silverman's records provided to plaintiff. Plaintiff does not identify the nature of the alleged notations on which he claims the jurors relied or exactly where in Dr. Silverman's records those notations were supposedly located. We find no evidence in the lower court record to support plaintiff's contention that the jurors told him that they relied on unspecified "notations" in Dr. Silverman's records. Plaintiff again relies on the affidavits of himself and his associate attorney that were signed on the day before he filed his appellate brief. As discussed earlier, those affidavits may not be considered because they are not contained in the lower court file, "and a party may not expand the record on appeal." *Detroit Leasing Co*, 269 Mich App at 237; see also *Sherman*, 251 Mich App at 56 ("This Court's review is limited to the record established by the trial court, and a party may not expand the record on appeal."). Further, we find no support in the affidavits for the assertion that the jurors relied on unspecified notations in Dr. Silverman's records.

In addition, plaintiff refers briefly to his motion to strike Dr. Silverman's testimony and records, but he does not present any coherent appellate argument that the trial court abused its discretion in admitting this evidence. Nor does plaintiff cite any authority to establish that it was inappropriate for Dr. Silverman to release his records to defense counsel. Again, plaintiff may not simply announce a position and leave it to this Court to discover and rationalize the basis for his claims, *Johnson*, 256 Mich App at 339-340, nor may he leave it to this Court to search for authority to sustain or reject his position, *Magee v Magee*, 218 Mich App 158, 161; 553 NW2d 363 (1996). Plaintiff offers no reason to conclude that the trial court's decision to admit Dr. Silverman's testimony and records fell outside the range of principled outcomes. Plaintiff fails to address why Dr. Silverman's records could not be provided to defense counsel where Dr. Silverman was an employee of Beaumont, a defendant in this matter, and where plaintiff placed decedent's medical condition at issue by filing this medical malpractice action. See MCL

600.2912f(1) (the filing of a notice of intent or a medical practice action waives for the purpose of that claim or action the physician-patient privilege with respect to a person or entity involved in the events that are the basis for the claim or who provided care or treatment for the condition related to the claim). Plaintiff also claims he was prejudiced because he did not receive Dr. Silverman's full records until the first day of trial. Plaintiff fails to address defendants' contention below and on appeal that the full records were made available to plaintiff at Dr. Silverman's deposition on August 3, 2012, which was more than one and one-half years before trial. Nor does plaintiff address why, even if defendants did not provide him with the records, plaintiff could not have obtained the records himself, given that he is the personal representative of decedent's estate. Overall, plaintiff has abandoned this issue by failing to present a coherent appellate argument or to cite any pertinent authority. *Johnson*, 256 Mich App at 339-340.

Plaintiff next argues that the trial court abused its discretion in excluding medical literature from 2014, in preventing plaintiff from testifying about contested issues given his dual role as an attorney and a fact witness, and in excluding a textbook that plaintiff's expert had characterized as unreliable. We disagree. This Court reviews for an abuse of discretion the decision whether to admit expert witness testimony. *Lenawee Co v Wagley*, 301 Mich App 134, 161; 836 NW2d 193 (2013).

Plaintiff again presents a disjointed argument. Plaintiff complains of the trial court's ruling that articles or textbooks published after March of 2009 could not be admitted. Plaintiff notes that the trial court would not allow him to testify as a fact witness regarding the results of research he performed concerning AV groove ruptures. Plaintiff also references the court's exclusion of a textbook that Dr. Weiman had previously stated he did not find reliable. Plaintiff argues that it is for the jury to determine the weight and the veracity of an expert's testimony. For the most part, plaintiff merely summarizes what occurred below and makes conclusory assertions that the court's decisions were erroneous. Therefore, plaintiff once again fails to present a coherent argument on this issue. Plaintiff may not simply announce a position and leave it to this Court to discover and rationalize the basis for his claims; this issue is therefore abandoned. *Johnson*, 256 Mich App at 339-340. We will nonetheless address the issue.

Plaintiff fails to address the specific basis for the court's decision to exclude articles from 2014, i.e., that the court found the articles more prejudicial than probative, given that the alleged malpractice occurred in 2009 and the article in question was written in 2014. See MRE 403 ("Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice . . . ."). An issue is abandoned when a party fails to address the basis of the trial court's decision. *Derderian v Genesys Health Care Sys*, 263 Mich App 364, 381; 689 NW2d 145 (2004). Moreover, the state of the art that existed at the time of the alleged malpractice is what determines the appropriate standard of care. See MCL 600.2912a(1) (stating that the plaintiff has the burden of proving a breach of the standard of practice or care "in light of the state of the art *existing at the time of the alleged malpractice*[.]") (emphasis added); *Craig ex rel Craig v Oakwood Hosp*, 471 Mich 67, 86; 684 NW2d 296 (2004) (holding that, to establish a cause of action for medical malpractice, a plaintiff must prove, *inter alia*, "the appropriate standard of care governing the defendant's conduct *at the time of the purported negligence*[.]") (emphasis added). Plaintiff does not explain why he needed to use medical literature from 2014 to establish the standard of care in 2009. Plaintiff also fails to elucidate whether the 2014 literature that he sought to use accurately reflected the state of the art that existed at the time of

the alleged malpractice. Plaintiff has therefore failed to establish that the exclusion of medical literature from 2014 fell outside the range of principled outcomes.

Plaintiff also fails to address in his argument on this issue the specific basis for the trial court's decision to prohibit plaintiff from testifying about his research concerning the proper method of repairing an AV groove rupture. In particular, the court found plaintiff's proposed testimony on this matter to be prohibited by MRPC 3.7(a), which states:

> A lawyer shall not act as advocate at a trial in which the lawyer is likely to be a necessary witness except where:
>
> (1) the testimony relates to an uncontested issue;
>
> (2) the testimony relates to the nature and value of legal services rendered in the case; or
>
> (3) disqualification of the lawyer would work substantial hardship on the client.

The trial court found that the second and third exceptions were inapplicable, and that plaintiff therefore needed to confine his testimony to uncontested issues in order to comply with MRPC 3.7. The proper method of repairing an AV groove rupture was a contested issue at trial. The trial court therefore reasonably concluded that plaintiff, who was trial counsel, could not testify on the matter. Plaintiff ignores the trial court's reasoning, and his argument is therefore abandoned. *Derderian*, 263 Mich App at 381.

Finally, plaintiff challenges the trial court's exclusion of a textbook that his expert, Dr. Weiman, had previously stated he did not find reliable, and testimony based on the textbook. Plaintiff argues that the weight and veracity of expert testimony is for the jury to determine. However, a trial court is required to act as a "gatekeeper" to ensure that proposed expert testimony is reliable before it is admitted into evidence. See MRE 702; *Edry*, 486 Mich at 640, citing *Daubert v Merrell Dow Pharm, Inc*, 509 US 579, 589; 113 S Ct 2786; 125 L Ed 2d 469 (1993); *Lenawee Co*, 301 Mich App at 162; see also MRE 707 (a published treatise may be used for impeachment only if it is a reliable authority).[3] Dr. Weiman acknowledged making earlier comments suggesting that he did not view the textbook as reliable. Although Dr. Weiman's prior statement indicated at one point that the textbook "may be" reliable, and although he then tried to clarify at trial that textbooks have some parts that are reliable and other parts that are out of date, his prior statement could reasonably be viewed as expressing the view that he did not find the textbook reliable. Because plaintiff fails to address in this issue the trial court's

[3] Plaintiff was seeking to use the textbook to *support* his own expert's testimony rather than for impeachment purposes. Plaintiff fails to cite authority addressing the admissibility of a textbook in these circumstances. Learned treatises may not be used as substantive evidence in a case, but they may be used for other relevant, nonhearsay reasons that are not substantially more prejudicial than probative. *Hilgendorf v St John Hosp & Med Ctr Corp*, 245 Mich App 670, 702; 630 NW2d 356 (2001). Plaintiff does not elucidate a legal ground for admitting the textbook.

gatekeeper role to ensure the reliability of expert testimony, he has not articulated any argument that any further determination concerning reliability was required. Plaintiff has failed to establish that the exclusion of the textbook or related testimony fell outside the range of principled outcomes.

Plaintiff next argues that the trial court erred in denying plaintiff's motion for a directed verdict. We disagree. A trial court's decision on a motion for a directed verdict is reviewed de novo. *Genna v Jackson*, 286 Mich App 413, 416; 781 NW2d 124 (2009). This Court views the evidence in the light most favorable to the nonmoving party. *Id*. "A directed verdict is appropriate only when no factual question exists upon which reasonable minds could differ." *Roberts v Saffell*, 280 Mich App 397, 401; 760 NW2d 715 (2008). "When reviewing a trial court's decision on a motion for a directed verdict, this Court recognizes the unique opportunity of the jury and the trial judge to observe witnesses and the fact-finder's responsibility to determine the credibility and weight of the testimony." *Foreman v Foreman*, 266 Mich App 132, 136; 701 NW2d 167 (2005) (quotation marks omitted).

Plaintiff argues that Dr. Goodman was never offered as an expert witness or questioned regarding his qualifications or expertise in accordance with the requirements of MRE 702 and 703. Therefore, plaintiff contends, the defense lacked an expert to contradict the testimony of plaintiff's expert, Dr. Weiman, and a directed verdict should have been granted. Further, plaintiff asserts that even if the trial court could accept Dr. Goodman as an expert without his having been offered as an expert, a directed verdict for plaintiff against Dr. Tepe was required because Dr. Goodman did not offer an opinion concerning what Dr. Tepe did during the surgery or whether he complied with the standard of care. We disagree with plaintiff's argument.

"In a medical malpractice case, the plaintiff bears the burden of proving: (1) the applicable standard of care, (2) breach of that standard by defendant, (3) injury, and (4) proximate causation between the alleged breach and the injury. Failure to prove any one of these elements is fatal." *Wischmeyer v Schanz*, 449 Mich 469, 484; 536 NW2d 760 (1995). Moreover, a "jury is free to credit or discredit any testimony." *Kelly v Builder's Square, Inc*, 465 Mich 29, 39; 632 NW2d 912 (2001). "Assessing credibility and weighing testimony is the prerogative of the trier of fact." *Id*. at 40. Given that plaintiff had the burden of proof, and that the jury was free to discredit the testimony of plaintiff's witnesses, it is unclear how plaintiff could establish entitlement to a directed verdict even if, as plaintiff claims, defendants failed to present expert testimony to contradict the testimony of plaintiff's expert. That is, the jury could have chosen to discredit the testimony of plaintiff's expert and concluded that plaintiff failed to establish a breach of the applicable standard of care. No basis exists to upset the jury's verdict because assessing credibility and weighing testimony is the prerogative of the jury. *Id*.; *Foreman*, 266 Mich App at 136. In any event, defendants presented an expert in their defense.

MRE 702 provides:

> If the court determines that scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education may testify thereto in the form of an opinion or otherwise if (1) the testimony is based on sufficient facts or data, (2) the testimony is the

product of reliable principles and methods, and (3) the witness has applied the principles and methods reliably to the facts of the case.

MRE 703 states:

> The facts or data in the particular case upon which an expert bases an opinion or inference shall be in evidence. This rule does not restrict the discretion of the court to receive expert opinion testimony subject to the condition that the factual bases of the opinion be admitted in evidence thereafter.

MCL 600.2169(1)(b) provides that, to qualify as an expert witness on the appropriate standard of care in a medical malpractice action, a witness must satisfy, *inter alia*, the following criteria:

> [D]uring the year immediately preceding the date of the occurrence that is the basis for the claim or action, [the proposed expert] devoted a majority of his or her professional time to either or both of the following:
>
> (*i*) The active clinical practice of the same health profession in which the party against whom or on whose behalf the testimony is offered is licensed and, if that party is a specialist, the active clinical practice of that specialty.
>
> (*ii*) The instruction of students in an accredited health professional school or accredited residency or clinical research program in the same health profession in which the party against whom or on whose behalf the testimony is offered is licensed and, if that party is a specialist, an accredited health professional school or accredited residency or clinical research program in the same specialty.

MCL 600.2169(2) states:

> In determining the qualifications of an expert witness in an action alleging medical malpractice, the court shall, at a minimum, evaluate all of the following:
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> (a) The educational and professional training of the expert witness.
>
> (b) The area of specialization of the expert witness.
>
> (c) The length of time the expert witness has been engaged in the active clinical practice or instruction of the health profession or the specialty.
>
> (d) The relevancy of the expert witness's testimony.

A trial court has discretion in determining the qualification of expert witnesses. *Gay v Select Specialty Hosp*, 295 Mich App 284, 290; 813 NW2d 354 (2012). However, "this Court reviews de novo whether the trial court correctly selected, interpreted, and applied the law." *Id*. at 291. "[T]rial courts must – at every stage of the litigation – serve as the gatekeepers who ensure that the expert and his or her proposed testimony meet the threshold requirements." *Id*. "[T]he party proposing to call an expert bears the burden to show that his or her expert meets [the requisite] qualifications." *Id*. at 293.

Plaintiff states that Dr. Goodman did not qualify as an expert witness because defense counsel failed to offer him as an expert or to question him regarding his qualifications or expertise. Therefore, plaintiff asserts, the testimony of plaintiff's expert stood without contradiction, entitling plaintiff to a directed verdict. However, defense counsel's examination of Dr. Goodman established that he was qualified to testify as an expert by his knowledge, skill, experience, training, or education, in accordance with MRE 702, and that he satisfies the statutory requirements for qualification as an expert in this medical malpractice action. Dr. Goodman testified that he has been a cardiac surgeon for 33 years, that he graduated from the University of Nebraska Medical School in 1974, that he performed residencies in general surgery and then in cardiothoracic surgery that were completed in 1981, and that he then became board certified in cardiothoracic surgery and a member of the Society of Thoracic Surgeons. At the time of the alleged malpractice in 2009, Dr. Goodman was functioning as a cardiac surgeon. He is also the chief of cardiac surgery at Providence Hospital. Dr. Goodman has been involved in the type of complex heart surgery that decedent underwent and has been the assisting surgeon in four operations in which an AV groove rupture, the type of complication that arose in this case, occurred. Dr. Goodman commonly performs surgeries in which more than one heart valve is replaced.

Defense counsel's questioning also established the reliability of Dr. Goodman's testimony in this case. Dr. Goodman expressed familiarity with medical literature on the topic of AV groove ruptures, in addition to having had his own experience in surgeries in which AV groove ruptures occurred. Dr. Goodman reviewed the medical records in this case and heard the testimony of Dr. Marvar. After explaining both the internal and the external methods of repairing an AV groove rupture, Dr. Goodman opined that Dr. Sakwa made the only decision that he could in choosing to attempt an external repair; in Dr. Goodman's view, an internal repair would have had no chance of working given the length of time it would have taken and the amount of time that decedent would have had to remain on the heart-lung machine. Dr. Goodman further expressed the view that putting decedent back on the heart-lung machine after the external patch failed would have been inappropriate because decedent could no longer be saved; once a patient can no longer survive, the respectful thing to do is to stop the surgery and talk to the family. Dr. Goodman rejected the applicability of medical literature addressing an internal repair in an isolated mitral valve replacement operation, explaining that such literature could not be applied to the type of double valve, triple bypass operation that decedent underwent. Moreover, Dr. Goodman concluded from Dr. Marvar's testimony that decedent's heart was irretrievably gone when the external patch was failing, and Dr. Goodman was not certain that decedent would have survived even if the AV groove rupture had not occurred, given her age and the long and difficult nature of the operation. The record reflects that Dr. Goodman's testimony was based on sufficient facts or data and was the product of reliable principles and methods that were applied reliably to the facts of the case.

It is true that defense counsel did not directly ask the trial court to state that Dr. Goodman was qualified as an expert witness and that the trial court did not formally state that Dr. Goodman was qualified. But plaintiff cites no authority establishing that such a formal request by counsel and an explicit statement by the trial court are required to admit expert testimony, or that the absence of such a formal request and ruling comprises error requiring reversal. A party may not leave it to this Court to search for authority to sustain or reject its position. *Magee*, 218 Mich App at 161. In another context, this Court has indicated that the absence of a formal ruling

that a witness is qualified as an expert is not an error requiring reversal. See *People v Dobek*, 274 Mich App 58, 76-79; 732 NW2d 546 (2007) (finding no prosecutorial error in the elicitation of testimony from a detective concerning sex abuse victims' delayed disclosure without the detective having been formally qualified as an expert where his knowledge and experience established that he was qualified to give an expert opinion on the subject).

Moreover, plaintiff did not object during Dr. Goodman's testimony to his qualifications or to the reliability of his testimony. "A party opposing the admission of evidence must timely object at trial and specify the same ground for objection that it asserts on appeal." *In re Weiss*, 224 Mich App 37, 39; 568 NW2d 336 (1997) (footnote omitted), citing MRE 103(a)(1). The trial court admitted Dr. Goodman's testimony and, given the lack of timely objection to his qualifications or to the reliability of his testimony, there is no basis to conclude that Dr. Goodman's testimony should be excluded from consideration in evaluating whether plaintiff was entitled to a directed verdict. As summarized above, the testimony of Dr. Goodman contradicted the testimony of Dr. Weiman concerning whether defendants breached the standard of care. Accordingly, the conflicting testimony presented a factual question upon which reasonable minds could differ.

Plaintiff asserts that even if the trial court could accept Dr. Goodman as an expert without his having been formally offered, the trial court should nonetheless have granted a directed verdict for plaintiff against Dr. Tepe because Dr. Goodman stated that he could not determine from the medical records what Dr. Tepe did during the surgery. Thus, plaintiff contends that there is no testimony that Dr. Tepe complied with the standard of care. This argument is flawed. Dr. Tepe himself testified about what he did during the surgery. Dr. Goodman was not testifying as a fact witness concerning what each surgeon did at each point of the operation. More importantly, Dr. Goodman expressed opinions concerning the theory of liability asserted by plaintiff against Dr. Sakwa and Dr. Tepe with respect to the proper method of repairing an AV groove rupture. As discussed, Dr. Goodman expressed the view that the external method of repair was appropriate and that the internal method would not have worked in this case. As the AV groove rupture repair method was the only theory of liability asserted by plaintiff that was relevant to Dr. Tepe, Dr. Goodman's expert testimony that the proper repair method was used in this case supported the defense theory that defendants complied with the standard of care.

In addition, Dr. Tepe himself, who is board certified in general and thoracic surgery, testified that he and Dr. Sakwa did not breach the standard of care because the injury was not repairable once the heart ripped a second time after the external patch was placed. Dr. Tepe explained that an internal repair would have had no chance of working because it would have required an additional three hours in which the operation was undone and then the internal repair was effectuated. Dr. Tepe was not aware that anyone had ever described repairing an AV groove rupture in a double valve operation where the aortic valve came into play. Everything that Dr. Tepe has seen regarding internal repairs has involved tears in mitral valve operations, as opposed to a double valve operation where a tear occurs. The external repair that was attempted in this case took 10 minutes to perform. Dr. Tepe explained that going back and doing an internal repair after the external patch failed to hold and the heart was tearing would not have worked. The heart would not be okay after six hours of cross-clamp time and seven hours on bypass. Also, stitches would not hold after the heart had torn twice. Dr. Tepe stated that it would not have been ethical to put decedent back on the bypass machine to perform a futile procedure.

Further, the testimony of Dr. Marvar, the anesthesiologist in decedent's operation, established that decedent's heart was essentially clinically dead as decedent was coming off the bypass machine after the external repair attempt, and that full resuscitation efforts were made but failed to get the heart started. Dr. Marvar testified that it was a reasonable choice of Dr. Tepe not to give more blood products because there was nothing more that could be done to help get the heart started.

Viewing the evidence in the light most favorable to defendants, we conclude that reasonable minds could find that Dr. Sakwa and Dr. Tepe complied with the standard of care. Accordingly, plaintiff has failed to establish that he was entitled to a directed verdict.

Plaintiff next argues that the trial court erred in using a verdict form that failed to ask separately about each theory of malpractice that plaintiff asserted. Plaintiff waived review of this issue by submitting a proposed verdict form that did not ask separately about each theory of malpractice and by making no objection to the verdict form on this ground at trial. See *Quality Prod & Concepts Co v Nagel Precision, Inc*, 469 Mich 362, 374; 666 NW2d 251 (2003) (a waiver is a voluntary and intentional abandonment of a known right); *The Cadle Co v Kentwood*, 285 Mich App 240, 254-255; 776 NW2d 145 (2009) ("The usual manner of waiving a right is by acts which indicate an intention to relinquish it, or by so neglecting and failing to act as to induce a belief that it was the intention and purpose to waive.") (citation and quotation marks omitted). "A party who waives a right is precluded from seeking appellate review based on a denial of that right because waiver eliminates any error." *The Cadle Co*, 285 Mich App at 255.

Even if the issue was not waived, plaintiff would not be entitled to relief. Unpreserved issues are reviewed for plain error. *Richard v Schneiderman & Sherman, PC (On Remand)*, 297 Mich App 271, 273; 824 NW2d 573 (2012). "Plain error occurs at the trial court level if (1) an error occurred (2) that was clear or obvious and (3) prejudiced the party, meaning it affected the outcome of the lower court proceedings." *Duray Dev, LLC v Perrin*, 288 Mich App 143, 150; 792 NW2d 749 (2010). We note that plaintiff has abandoned this issue by failing to cite authority to support his position and by making a cursory argument. *Johnson*, 256 Mich App at 339-340. Plaintiff asserts that the verdict form "lopped" together the two theories of malpractice such that the jury could not tell that two theories of malpractice exist. But plaintiff cites no authority establishing that a verdict form must ask separately about each theory of malpractice. Over six days of trial, the jury heard extensive testimony and argument about each theory of malpractice, i.e., the issue concerning whether there was a lack of informed consent and the issue concerning the proper method of repairing the AV groove rupture. The verdict form then asked the jurors whether each defendant-doctor was professionally negligent. The record affords no basis to conclude that the jurors were confused or lacked an understanding that both theories of malpractice were being claimed as grounds for finding professional negligence. The verdict form properly asked about each element of a medical malpractice claim. Plaintiff has not established an outcome-determinative plain error.

Plaintiff next argues that the trial court made improper and prejudicial comments in front of the jury. We disagree. Plaintiff failed to preserve this issue by making a timely objection in the trial court. *People v Sardy*, 216 Mich App 111, 117-118; 549 NW2d 23 (1996); *O'Donnell v HJ Van Hollenbeck Leasing, Inc*, 12 Mich App 536, 539; 163 NW2d 280 (1968). Although plaintiff raised this issue in his motion for judgment notwithstanding the verdict (JNOV) or a

new trial, this did not comprise a timely objection. See *Herbert v Durgis*, 276 Mich 158, 166; 267 NW 809 (1936).

In determining whether a trial court's comments made during the course of a trial were improper and prejudicial, a reviewing court must consider the context in which the comments were made. *Dykema Gossett, PLLC v Ajluni*, 273 Mich App 1, 18; 730 NW2d 29 (2006), vacated in part on other grounds 480 Mich 913 (2007). Reversal is not warranted on the basis of a judge's comments if the record reflects that the verdict rendered was that of the jury rather than the expressed opinion of the trial court. *Id*. Unpreserved issues are reviewed for plain error affecting substantial rights. *King v Oakland Co Prosecutor*, 303 Mich App 222, 239; 842 NW2d 403 (2013). "Plain error occurs at the trial court level if (1) an error occurred (2) that was clear or obvious and (3) prejudiced the party, meaning it affected the outcome of the lower court proceedings." *Duray Dev, LLC*, 288 Mich App at 150.

" 'Michigan case law provides that a trial judge has wide discretion and power in matters of trial conduct. . . . This power, however, is not unlimited.' " *City of Lansing v Hartsuff*, 213 Mich App 338, 349; 539 NW2d 781 (1995), quoting *People v Collier*, 168 Mich App 687, 698; 425 NW2d 118 (1988). Reversal is required if a trial court pierces the veil of judicial impartiality. *Hartsuff*, 213 Mich App at 349. A court pierces the veil of judicial impartiality when its conduct or comments are of such a nature that they unduly influence the jury and deprive the appellant of a fair and impartial trial. *Id*. at 350. Challenged remarks must be considered in context to determine whether they were improper and prejudicial. *Dykema Gossett, PLLC*, 278 Mich App at 18. The fact that a court's remarks were improper does not by itself establish the denial of a fair trial; the record must demonstrate that the court's comments reflected bias and prejudiced the jury. *Id*. at 20. As discussed, because plaintiff failed to object on this ground below, this Court's review is limited to determining whether there was a plain error affecting substantial rights. *Duray Dev, LLC*, 288 Mich App at 150; see also *Dykema Gossett, PLLC*, 273 Mich App at 20 ("We also note that defense counsel failed to object at trial to the comments complained of on appeal; had they done so, they might have minimized the commentary.").

Plaintiff first complains that the trial court told plaintiff in chambers on the first day of trial that it would not allow plaintiff to be both an attorney and a witness, notwithstanding an order allowing this that was entered by the predecessor trial judge, and that the trial court "finally relented after much pleading by" plaintiff. This argument is flawed in three respects.

First, there is no basis in the record for plaintiff's assertion that the trial court made these comments in chambers. Plaintiff again relies on an affidavit that was prepared on the day before he filed his appellate brief and which is not in the lower court record. This affidavit may not be considered because a party may not expand the record on appeal. *Detroit Leasing Co*, 269 Mich App at 237; *Sherman*, 251 Mich App at 56.

Second, the predecessor trial judge's December 27, 2012 order on which plaintiff relies does *not* state that plaintiff may serve as *both* the trial attorney *and* a witness at trial. Rather, the order states that plaintiff may remain as trial counsel, without addressing whether he may also be a witness. Indeed, in his motion for approval to act as trial counsel that led to the entry of the predecessor judge's order, plaintiff explicitly stated that although he was a named witness in this matter, he was *not* a necessary witness. In his motion, plaintiff stated: "There is no information

which could be elicited from Attorney Herschfus at the time of Trial that would constitute Attorney Herschfus being a 'necessary witness,' as there are other persons that could bring forth the information at issue too." Plaintiff further stated in the motion that he "is not a necessary witness to this action, in that the testimony and information he could provide at the time of Trial could also be brought forth through other witnesses; therefore, Plaintiff requests this Honorable [sic] grant approval allowing Attorney Brian H. Herschfus to act as Plaintiff's Counsel at Trial." Therefore, it is disingenuous for plaintiff to assert that the predecessor trial judge's order allowed plaintiff to be *both* the trial attorney *and* a witness; on the contrary, the order only granted plaintiff's request to be trial counsel, and plaintiff's motion that led to the entry of the order explicitly stated that plaintiff was *not* a necessary witness because other witnesses could provide the same testimony and information that plaintiff could provide.

Third, even if the predecessor trial judge's order allowed plaintiff to serve as both trial counsel and a witness (despite the contrary representation in plaintiff's underlying motion), and even if the trial court had told plaintiff in chambers on the morning of the first day of trial that it would not allow him to be both an attorney and a witness (despite the lack of record support for such a claim), plaintiff himself admits that the trial court ultimately relented and allowed plaintiff to be both the trial counsel and a witness. Therefore, plaintiff has not suffered any prejudice arising from the trial court's alleged comments in chambers expressing an initial reluctance to allow plaintiff to serve both functions, given that the trial court ultimately permitted plaintiff to be both an attorney and a witness in this case.

Plaintiff next contends that the trial court "took [plaintiff] to task" several times in front of the jury. Plaintiff complains of a two-minute bench conference that occurred during plaintiff's testimony. Plaintiff claims that the trial court "was blasting" plaintiff and that the jury could hear the trial court's "anger and contemptuous statements about [plaintiff] and declaring a [m]istrial." Although the record reflects that a bench conference was held after plaintiff gave a single answer that encompassed two pages of trial transcript, the record does not reveal what was said during the bench conference. There is no support in the record for plaintiff's claim that the trial court "blast[ed]" plaintiff, made "angry and contemptuous statements" about plaintiff, or threatened to declare a mistrial. Plaintiff's appellate contention on this point is therefore unsupported.

Plaintiff asserts that the trial court cut off plaintiff's testimony and refused to allow him to address fact and damages questions. Plaintiff claims that the trial court took a 32-minute recess where, after excusing the jury, the court "yelled at [plaintiff] and refused to allow him in [c]hambers at that point because he was a witness." According to plaintiff, the trial court required plaintiff's "young associate to show [the court] questions that she was planning to ask [plaintiff]; all in front of [defense counsel]." Plaintiff claims the trial court told plaintiff's associate not to ask plaintiff "pages of questions."

The record does not indicate that the court engaged in any improper behavior. The record reflects that plaintiff was beginning to testify about the results of his own investigation of the proper method to repair an AV groove rupture. Plaintiff testified that he had obtained two textbooks and "some professional papers on repairing an AV groove rupture[.]" The trial court then stated that it wanted to see counsel in chambers. After the jury was excused, the trial court stated, "Let me see counsel. Not you, [plaintiff]. You're the witness." The record does not support plaintiff's claim that the trial court yelled at him. The record also does not reflect what

occurred during the 32-minute recess. There is no support for plaintiff's claim that the trial court forced plaintiff's associate to read aloud her questions in front of defense counsel. Plaintiff relies on the affidavit of his associate attorney, but that affidavit may not be considered because it is not part of the lower court record and a party may not expand the record on appeal. *Detroit Leasing Co*, 269 Mich App at 237; *Sherman*, 251 Mich App at 56.

Plaintiff next complains that the trial court erred in refusing to allow plaintiff to testify about decedent's loss of consciousness and impaired cognitive capacity, which plaintiff claims was relevant to the applicability of a higher damages cap. During plaintiff's testimony, his associate asked plaintiff to explain to the jury what noneconomic damages are. Plaintiff testified about the amount he was seeking in noneconomic damages. He then explained:

> But there's an alternative to that, and that would be that at the time of the malpractice, between that time of malpractice and the time of my mom's actual death, there's a period of time when she obviously had no cognitive ability, and during – because of that period –

Defense counsel then interposed an objection based on a lack of foundation. The trial court stated: "I tend to agree. I tend to agree. He's not a damages expert. Sustain the objection." When plaintiff's associate again tried to ask him about "an alternative theory of claims" for noneconomic damages, the trial court stated, "And I've already – and I've already sustained that objection. So let's not get into it." Plaintiff claims he was entitled to present testimony to support his theory that an enhanced damages cap applied because decedent had sustained a permanently impaired cognitive capacity. See MCL 600.1483(1)(b). Plaintiff contends that decedent suffered an impaired cognitive capacity for approximately one hour before her death. But plaintiff ignores the basis of the trial court's ruling, i.e., that plaintiff was not qualified to testify as a damages expert. Plaintiff fails to address why he was qualified to testify concerning whether decedent suffered a permanently impaired cognitive capacity before her death. An issue is abandoned when a party fails to address the basis of the trial court's decision. *Derderian*, 263 Mich App at 381. Plaintiff also fails to acknowledge that it is the trial court, rather than the jury, that serves as the finder of fact in determining whether the unique damages necessary to apply the higher cap exist. See *Shivers v Schmiege*, 285 Mich App 636, 646; 776 NW2d 669 (2009). Plaintiff fails to explain why testimony should have been presented *to the jury* regarding the unique damages necessary to apply the higher cap. Plaintiff has not established that the trial court erred in sustaining the defense objection to this testimony, let alone that the trial court's action comprised improper behavior that denied plaintiff a fair trial.

Next, plaintiff asserts that the trial court made "rulings and announcements" in chambers during which the court "came down hard on" plaintiff, including by threatening to file a grievance against him for being both a witness and the trial counsel, even though there was a court order allowing it, and then by refusing to grant an adjournment so that plaintiff could replace himself as either trial counsel or as a witness. Plaintiff claims that the trial court brought up the issue throughout trial by threatening plaintiff with mistrials and a grievance. Plaintiff claims the trial court prohibited plaintiff from testifying regarding certain matters because of MRPC 3.7 notwithstanding the predecessor trial judge's order. Plaintiff asserts that the trial court was "livid" with plaintiff because of his dual role and the predecessor trial judge's order, and that the trial court's "admanishments [sic]" in front of the jury were "harsh, curt and contrary to the [court's] statements when other witnesses testified." Plaintiff contends he could have

received a fair trial if the court had "reversed" the predecessor trial judge's order "long before trial" so that plaintiff could obtain a substitute counsel or withdraw as a witness and as personal representative of decedent's estate.

Plaintiff's arguments are repetitive and devoid of merit. Again, there is nothing in the record to support plaintiff's claims regarding discussions that occurred in chambers. Plaintiff's reliance on affidavits presented for the first time on appeal is inappropriate because the parties may not expand the record on appeal. *Detroit Leasing Co*, 269 Mich App at 237; *Sherman*, 251 Mich App at 56. Plaintiff's repeated characterization of the predecessor trial judge's order as allowing plaintiff to act as both trial counsel and a witness is disingenuous given that the order said only that plaintiff may act as trial counsel without addressing whether he would be a witness, and plaintiff had represented in the motion underlying that order that he was *not* a necessary witness in this case. The trial court understandably expressed concern about plaintiff's compliance with MRPC 3.7(a). The trial court's limitation of plaintiff's testimony to uncontested issues comported with MRPC 3.7(a), which states:

> A lawyer shall not act as advocate at a trial in which the lawyer is likely to be a necessary witness except where:
>
> (1) the testimony relates to an uncontested issue;
>
> (2) the testimony relates to the nature and value of legal services rendered in the case; or
>
> (3) disqualification of the lawyer would work substantial hardship on the client.

The trial court found that the second and third exceptions were inapplicable, and that plaintiff therefore needed to confine his testimony to uncontested issues in order to comply with MRPC 3.7. Plaintiff contends that the substantial hardship exception would apply but fails to explain why, other than to assert that the predecessor trial judge had entered an order allowing him to be both an attorney and a witness. Again, plaintiff is distorting what occurred, given that the predecessor judge's order did not address whether plaintiff would be a witness and plaintiff had previously represented that he was *not* a necessary witness.

Plaintiff's contention that the trial court was "harsh" and "curt" with plaintiff while he was testifying is devoid of merit. After plaintiff had testified for nearly two pages of transcript without a question being asked, the trial court stated, "This is all very well and good, but we're not doing narratives here. This is questions and answers." On another occasion where plaintiff gave a very long answer to a question, the trial court interrupted to state, "Okay. Answer the question, and we can do without the editorial comments. Just talk about the facts. You're not here as a lawyer right now. You're a witness." These comments were reasonable efforts to confine plaintiff to testifying as a fact witness in a question and answer format rather than providing narrative testimony. Even if the court expressed some disapproval or criticism of plaintiff, "[t]he court's remarks were within the bounds of what imperfect men and women sometimes display." *Schellenberg v Rochester Elks Lodge*, 228 Mich App 20, 40; 577 NW2d 163 (1998) (quotation marks, punctuation, and citations omitted). Overall, plaintiff has failed to establish that any of the trial court's comments or actions denied him a fair trial.

But even if any of the court's comments in front of the jury were improper, any prejudice was alleviated because the trial court told the jury in closing instructions:

> My comments, rulings, questions, and instructions are also not evidence. It's my duty to see that the trial is conducted according to the law, and to tell you the law that applies to this case. However, when I make a comment or give an instruction, I'm not trying to influence your vote or express a personal opinion about the case. If you believe I have an opinion about how you should decide the case, you must pay no attention to that opinion. You're the judges of the facts, the only judges of the facts, and you should decide this case from the evidence presented.

The jury is presumed to follow the court's instructions, which are presumed to cure most errors. *Zaremba Equip, Inc v Harco Nat'l Ins Co*, 302 Mich App 7, 25; 837 NW2d 686 (2013). Plaintiff was not denied a fair and impartial trial.

Plaintiff next argues that the trial court erred in denying plaintiff's motion for JNOV or a new trial. A trial court's decision on a motion for JNOV is reviewed de novo. *Genna*, 286 Mich App at 417. A trial court's decision whether to grant a new trial is reviewed for an abuse of discretion. *Kelly*, 465 Mich at 34. Plaintiff fails to present any new argument on this issue. Instead, plaintiff merely references his arguments discussed earlier, which were the arguments he presented in his motion for JNOV or a new trial. As discussed, plaintiff's arguments on those issues lack merit. Therefore, plaintiff has not established that he was entitled to JNOV or a new trial.

In light of our resolution of the above issues, we need not address the alternative grounds for affirmance asserted in defendants' appellee brief or the issue raised on cross-appeal.

Affirmed.

/s/ Kathleen Jansen
/s/ David H. Sawyer
/s/ Karen M. Fort Hood